Supreme Court of the United States

October Term, 1976

No. 76-1287

ROBERT STONE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Robert Stone, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, made and entered herein on February 17, 1977 (See Appendix "A", *infra*, p. 49).

OPINIONS BELOW

No formal opinions were rendered by the trial court. That Court's opinion denying the Motion to Suppress is attached as Appendix "B", at p. 50. The Court of Appeals likewise did not render any opinion. In all deference to that Court, its rather summary disposition of this appeal

was made immediately after the oral arguments were concluded. And, a copy of conclusory reasons stated at that time as the basis for the Court's affirmance is not available to counsel.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was entered on February 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the trial court err in denying the petitioner's motion to suppress certain illegally acquired evidence?
2. Whether the admission of certain evidence, showing the content of various conversations, had by a crucial government witness with a third party, violated the petitioner's "right of confrontation" and the "hearsay rule"?
3. Whether a conspiracy and an accused's membership therein (either as a foundation for the admission of declarations assertedly made in furtherance thereof, or as a criminal offense) can be established on the basis of hearsay statements?
4. When defense counsel admits to being under indictment for various narcotics law violations, which were then pending in the district where his client was being tried (and by counsel's own admission would "presumably" involve agents from the same investigative unit participating in the presentation of the government's case against his client), is there "a conflict of interest as

a matter of law"? If not this, then is due process satisfied by the accused simply admitting during the course of a perfunctory hearing that he had no objections to being represented by such counsel; or is the court required to conduct an in-depth inquiry of all parties, including the government, to insure that the accused is fully advised as to all the *relevant* facts?

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

21 United States Code:

§841(a)(1):

"Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

§841(b)(1)(A):

"Except as otherwise provided in section 405 [21 U.S.C. §845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment."

§878(3):

"Any officer or employee of the Bureau of Narcotics and Dangerous Drugs designated by the Attorney General may—

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony."

STATEMENT OF THE CASE

Robert Stone, the petitioner herein, stands convicted and is under sentence, by a District Judge (the Honorable Inzer B. Wyatt) in and for the Southern District of New York, for conspiracy to violate the Federal Drug Law (21 U.S.C. §812, §841(a)(1), and §841(b)(1)(A); and for two additional counts charging substantive violations of the same statutes.

Prior to trial, one Danny Roman who was also named in this indictment pled guilty to certain of the charges as set forth in the indictment. The other named defendant—that is, Phyllis Greene, the person with whom Stone lived, was acquitted by the same jury that convicted Stone.

Stone was sentenced to a concurrent penal term of ten (10) years imprisonment. Bail was denied pending appeal.

STATEMENT OF FACTS

There is no dispute here as to whether Danny Roman actually sold the various quantities of Cocaine on the three distinct occasions charged in this indictment. The issues that were tried out, and partially resolved by the jury in favor of *both* Petitioner and the Government, dealt with the sufficiency of the Government's proof to establish that this Petitioner, hereinafter referred to as "Stone", participated in the charged episodes involved in the various controlled transactions that took place between Roman and the Government's informer-witness, Magdalena Gogue.

Prior to trial Stone and Phyllis Greene (as defendants) filed under favor of Rule 41, *Federal Rules of Criminal Procedure*, a Motion to Suppress. On the basis of this motion they sought the exclusion, as illegally seized evidence, of all property acquired incident to their arrest and the searches made at, and in, their home.

Because of the significant contexts in which the evidence was developed, the facts here will be presented in two categories styled (A) The pretrial motion and (B) The trial.

A. The pretrial motion

In support of both the various searches made at this residence, the Government first called Drug Enforcement Administration (hereinafter referred to as "DEA") agent Edward Kelley. It was Kelley's testimony that on August 3, 1976, the date of the arrest, Miss Gogue made arrangements to which he was privy (having listened in on the conversation) to conduct a controlled narcotics transaction with Roman, involving the sale of two ounces of Cocaine

for Three Thousand Six Hundred Dollars ($3,600.00) (M.T., 14-15).[1]

Roman was later observed picking up Gogue, after she had been dropped off by another agent on a particular street corner (M.T., 17-18). Shortly thereafter, Kelley was advised they had travelled to the vicinity of Stone's apartment building located on York Avenue (M.T., 18). Still later, Kelley saw Roman exit this building (M.T., 19). He was then seen by other agents rejoining Gogue, who had remained in Roman's car during the interval of time he was in the building (M.T., 20).

Shortly after this, upon reception of a prearranged signal given by Gogue, Roman was intercepted and arrested (M.T., 22-23). A search of Roman produced Two Thousand Six Hundred and Fifty Dollars ($2,650.00) in currency. Some of this money had been used "in the purchase . . . on July 30th" (M.T., 24).[2]

In any event this agent could only indicate August 11th as the date he compared the money taken from Roman with the August 3rd serialization list (M.T., 27). This position the witness maintained in spite of being invited

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1. Numerals in parentheses refer to the various transcripts developed during different phases of this case. When the designation is (M.T., ...) the reference is to the hearing on the Motion to Suppress. The designation (Tr., ...) is to the trial proper; whereas (H.T., date, ...) is a reference as to certain ancillary hearings and rulings.

2. It was at this point the Court, while crystallizing a significant point, also signaled its ultimate position. Here the Record shows the following:

> "The Court: When you found that $2650, . . . you could at that time only compare it with the July 30th money list?
>
> The Witness: That's correct, your Honor.
>
> . . .
>
> The Court: And . . . you concluded that having found two there was probably more.
>
> The Witness: Yes, your Honor." (M.T., 26).

to testify he had possibly learned of a comparison prior to that date (*ibid.*).

Kelley also testified that during these conversations with Roman, the agents attempted to proposition Roman to, in some way, victimize Stone for their benefit. In developing this idea for the Court, Kelley testified that when Roman *was told* they were aware that he had gotten the drugs *from Stone*, he (Roman) supposedly "nodded" (M.T., 28). This they considered to be an affirmation (M.T., 30).

Kelley also testified that during these conversations, after having rejected the ploys suggested to him by the agents for possible use by him in duping Stone, Roman then stated:

> "Well, why *couldn't* I do this? Why couldn't we wait and I could order up some—order up a package *from them* and *they* could have it ready" (M.T., 29). (Emphasis added.)

Thus, the Government should be hard pressed to deny their original plans were only "that the arrest of Stone was going to take place that day" (M.T., 29). And, that it was only after Kelley asked Roman if "[by] them [he meant] Stone and his wife" (*ibid.*) that the arrest plans were expanded to include Phyllis Greene.

In any event, upon Kelley's later return to the apartment building, he joined other agents who were present. It was then that "a ruse was planned to draw Stone out of his apartment" (M.T., 31). In fact, it was the call from the agents that caused Stone to go to the garage. The pretext used was to deceive him into believing there was some question the authorities wanted him to clear up involving the ownership of his car (M.T., 32). Be all that as it may, Stone was arrested in the basement

for, as it was put by Government's counsel, "violation of Federal Narcotics Laws" (M.T., 33).

Another "ruse" was then developed to draw Phyllis Greene from the apartment (M.T., 33), following which she too headed for the basement, and had confrontation with various agents. Still later, and while she was outside the apartment itself, Kelley says he placed Greene "under arrest for violation of Federal Narcotics Laws"[3] (M.T., 35).

Kelley then, in a well coached effort to vindicate their entry into the apartment, testified Phyllis Greene advised them that she had children inside that "had to be taken care of" (M.T., 35).

In any event, once inside the apartment Kelley says he concerned himself with whether there were other people on the premises. And, that it was for this reason he looked in the other rooms (M.T., 38). Here, the Record further shows that when these agents started searching, Greene protested by stating "You don't have a search warrant" (M.T., 39).

According to Kelley, Greene was told they were going to get a Search Warrant. And, it was his evidence that she was nonetheless asked, "If there were any valuables in the apartment" (M.T., 40). This, he says, prompted her to say *they* had a large amount of cash in the apartment that was to be used to pay *their* rent.

When this money was produced it was *seized* by Agent Hall. As put by Kelley, Agent Hall specifically indicated *they were going to "see* if the money matched any bills

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3. The validity of this arrest is, of course, a crucial factor here. For the District Judge concluded it was incident to this arrest that their original entry into the apartment was justified, and that it was following this event that she acquiesced to their presence inside the apartment and to their conduct therein. (See Appendix, at p. 54).

. . . on the money list" (M.T., 41) (Emphasis added). Not only this, Kelley added (and this testimony must be weighed by his earlier testimony about the comparison of this money to a money list) that the basis of his *suspicions* as to what was in the apartment was that:

> ". . . To the best of our knowledge, there had been a narcotics transaction conducted and at this point in time we hadn't receovered all the money that was expended on the transaction, so when we found a large amount of money we expected some of the money that was used to purchase the narcotics to be included in this" (M.T., 41).

The Court then created the idea that what the agent had told her was that they "were going to seize this money as evidence" *after* they told her she was going to their office to be processed (M.T., 45).

Suffice it to say, what apparently has been overlooked here is the fact that the agent's knowledge of the presence of the money had been impelled by Greene's actual *arrest*, and that what Agent Hall actually told Greene was that they "were going to collect . . . [the money] to see if it matched any of the bills on the money list" (M.T., 41). In all deference then, to the trial Court, his expressed notions as to the sequence of these events is not supported by the Record.

Kelley also tells us that somehow Agent Hall obtained Greene's handbag. Further, that while ostensibly making sure it did not contain any weapons (M.T., 47), Hall located the other sum of money (M.T., 46). This money too was confiscated immediately and compared with the serialization list. Here too, it was determined that some of the numbers matched the numbers on the list (M.T., 49).

Kelley's cross-examination shows that the reason the agents engineered the arrest of Greene to take place outside her apartment door was to put themselves in a position to "go into the apartment and station an agent inside the apartment" (M.T., 69), after which an effort was to be made to get a search warrant (M.T., 67). In Kelley's judgment this would have insured against any possible "violence or destruction of evidence" (M.T., 68).

Kelley also revealed, "there was an empty apartment on the 11th floor that was utilized by the agents" (M.T., 77) in their extensive surveillances inside the building. The significance of this will be borne out later. In addition, Kelley's evidence developed that Greene not only protested against the agents searching the apartment without a warrant (M.T., 79), she protested even more vigorously when they "checked some of the money" (M.T., 83). (To be sure, this later testimony seems to conflict with Kelley's earlier version of the episode involving the money found on the premises [M.T., 40-41].)

In any event, despite Greene's ineffective *protest* about the presence of the officers in the apartment, the searching began almost as soon as the officers entered with their drawn guns. The presence of the minor children, who were in the premises at the time (M.T., 84), only slightly deterred them from their preordained course—for which they seek absolution from this Court.

Given circumstances showing these officers were inside the apartment "almost a half hour" (M.T., 78) or "forty minutes" (M.T., 252); since it took the children only "five or ten minutes" (M.T., 84) to leave, Kelley's contention that there was no real searching "done in front of the children" (M.T., 84) authenticates the idea that a considerable amount of time was devoted to merely "securing" this apartment for a search to be conducted

later (M.T., 65). So postured, Phyllis Greene's yelling and protesting from the point when they started looking in the closets (M.T., 83) becomes a factor that must be reckoned with.

Jeffrey Hall, the supervisory agent, testified that he too participated in the arrest of Danny Roman on August 3rd. He was also aware of the events of July 30th (M.T., 121). Hall says he saw Roman walk up to the Stone-Greene apartment. When the door was opened, he supposedly heard Roman remark, "I'm sorry, baby" (M.T., 122). This was, Hall says, responded to by "a woman" (*ibid.*). Later, Hall, while obviously eavesdropping, heard Roman repeat that he was sorry for being late. The response this time, Hall says, came from a man who indicated that he had "just gotten back" (M.T., 123).

Still eavesdropping, from a position right next to the door, Hall says he heard the "buzzer inside the apartment" (M.T., 123). This caused him to believe someone was coming to the apartment. In fact, he did see a delivery of some groceries to the apartment. Later, he saw Roman depart from the apartment (M.T., 124).

Hall's recollection of the conversation had with Roman after his arrest, was that they told Roman [1] *they knew* he "came from Stone's apartment", and that [2] *they knew* he had gotten "the drugs from Stone" (M.T., 129-130). These revelations were made after Roman had asked: if there was "anything" he could do to avoid going to jail because he did not "want to do a day in jail" (M.T., 129). Hall's reply to this was [3] they intended to arrest *Stone* "that particular day" (M.T., 130).

Undeniably then, it was this latter statement that caused Roman to respond that *he could involve both Stone and Greene* in a narcotics transaction by ordering "a

package from him and they'd have the package waiting for . . . [him]," but the agents could show up for it (M.T., 130).

To be sure then, not only was it at this precise point that Kelley asked Roman if he meant by *them* "Stone and his wife" (*ibid.*), but it is now most obvious that it was on the basis of this response that the decision was made to also arrest Phyllis Greene. Stated another way, Kelley's question, when measured against Agent Hall's statement to Roman that "We know you got the drugs from Stone" (M.T., 130), as distinguished from *Stone and his wife*, exposes the decision to arrest Greene and being based solely on the statement attributed to Roman.[4] In any event, the Hall testimony shows it was from this point that the arrest plans were revised to include both "Stone and his wife" (M.T., 131).

Hall further testified it was his idea that Greene should be arrested as she was exiting the apartment. This, he felt, would have given them what he regarded as needed access to the interior of the apartment (M.T., 134).

And, of course, *after* Greene's arrest, and *after* the children had left the apartment, Hall concedes Greene refused to consent to a search of the premises. As put by Hall, when told that they would in any event be getting a

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4. In his belated opinion, dealing with the Motion to Suppress, the trial Court does not dispute this contention. Indeed, the trial Court's expressed view on this point actually bolsters our position. Here, the Court stated:

> "The agents talked to Dan [Roman], told him they had a good case against him and that they knew he got the Cocaine from the Stones' apartment [actually, the agents said they knew he got it 'from Stone' (M.T., 130)]. Dan nodded. They asked Dan to cooperate. He said he was afraid of Stone. *Dan asked the agents to wait and he would order a package from Stone and his wife.* The agents said they would not wait and finally Dan said he would not cooperate." (Emphasis added.) (See Appendix, at p. 52).

search warrant, Greene told them they "would not find anything except a lot of money that belonged to her and her husband" (M.T., 138).

This disclosure resulted in Hall asking her to show him the money (M.T., 138-139). Here, the Record shows that *after* Hall was merely shown this money, he "seized" it, by taking it from her. As Hall put it:

> "*I took the money away from her and I told her that I was going to hold the money* and there was going to be serialization sheets that I wanted to look at. I was going to compare the serial numbers from the bills . . . . with the serial numbers . . . to determine if this was government funds that was used to make a drug purchase" (M.T., 139). (Emphasis added.)

Despite the assurance that he was only going "to hold the money" (if, in fact, this is what he said), a meticulous search[5] was, in fact, made of this money, this occurred not only *before* Greene was taken from the premises, but *before* the agents had any warrant to search the premises. And, of course, this search occurred *after* Greene had complained about the officers searching the premises and *after* she specifically refused to consent to a search thereof. (It is of interest to note that the Court was apparently satisfied, contrary to Hall's earlier testimony that he took the money from Greene, that Hall had made it clear to

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5. Granted, as was his prerogative, the trial Court here, as is usually the case, fully credited the testimony given by the agents during the Suppression Hearing (Appendix, p. 51). Still, his finding of a "consent" to the "search" of the money for bills with serial numbers on their list is not so easily ratified. This is so for some very valid reasons. Included is the fact that despite her most vocal protest, the agents persisted in searching the premises. And, if we can credit, in spite of Hall's testimony that he "took the money away from her" (M.T., 139), the Court's view that she gave it to him; Greene's objections to his checking the money (M.T., 83) nonetheless supplies a sufficient factual refutation to this finding by the Court.

her they wanted the money, "and she did not resist" (M.T., 141). Stated another way, the Court was convinced Greene allowed Hall "to take the money from her" (M.T., 141).

Another fact of importance, as will be shown later, is that *before* the search warrant was obtained, the U.S. Attorney, who participated in its acquisition, was informed that all the money from the apartment had been checked against the serialization list (M.T., 192). It is likewise relevant that it was not shown that Agent Hall, or any other agent, ever sought permission *to trespass* upon the upper floors of this building. Indeed, the Record only shows, and this on cross-examination, that Agent Hall had, on some previous occasion, merely made it known to the doorman that he was a law enforcement officer (M.T., 187).

More importantly, Hall testified to being aware "there was a sign which said any person entering this building must be announced" (M.T., 186). Not only this, this supervising agent *confessed* to not having "had any conversation with the doorman concerning his reason *for* going into the building" (M.T., 186). Yet, despite the lack of permission to do so, Hall says, he went directly to the "11th floor" (M.T., 187).

Further, Hall's evidence shows he and other agents usurped the additional right to make "use of a vacant apartment [on the 11th floor] to secrete . . . [themselves]" (M.T., 187-188). The fact that these typical Drug Enforcement Administration agents had not "made known to any employee or official of the building, the premises, that . . . [they] were going to use that apartment" (M.T., 188), doubtless was because they deemed permission an unnecessary formality. On the other hand, the fact that this commanding officer had reason to believe this apartment was

vacant *before* he entered the building really aggravates what must have been violations of Trespassing Laws.

So that the issues on these points can be properly joined, the Government has already emphasized that the conversations testified as to having been overheard (—that is, seized as evidence) by the agents took place while they were "standing in front of the apartment door" (M.T., 194-195) on the 11th floor.

Agent *Michael Mella's* version of the agents' trespassing efforts on the 11th floor, included the revelation that they surreptitiously concealed themselves "in the fire-landing" from those people legitimately on that floor (M.T., 207). Mella's testimony is further significant from the standpoint that he reveals still another aspect of Agent Hall's command that resulted in Phyllis Greene being brought from the basement to the 11th floor. Mella says, he accomplished this feat by resorting to the willfully conceived device of asking "her if she would come upstairs and show . . . [them] some kind of certification of ownership of the car" (M.T., 213-214). While this tactic shows an intentional concealment of the officer's ulterior motives, it also proves Greene had not been sufficiently advised she was either under arrest or that she would be arrested.

In any event, Agent Mella agrees with the others that Greene complained vigorously about the officers searching her premises without a warrant (M.T., 217-218). Despite this, as Mella put it, at some point, even while they were apparently ignoring her protests, Phyllis Greene admitted to having some money in the apartment. This money, he says, she surrendered to them (M.T., 219, 222).

Then there is the cross-examination of Agent Mella. This developed that he had been expressly told, by Hall, "to see if Miss Greene had been placed under arrest and

see if she could come up to the 11th floor" (M.T., 244). In dealing with this same point, Agent *Alexander Smith's* evidence was that upon seeing Phyllis Greene in the garage he wanted "to verify who she was" (M.T., 262), and that it was for this reason he "instructed her to take the agent upstairs to her apartment and get her identification" (M.T., 268). According to Smith, *"If she was Mr. Stone's wife and she was in the apartment just after a narcotics deal had been transacted, then she might be the culpable party and a co-conspirator.*[6] If she wasn't who she said she was and she was coming from that apartment or she just happened to appear with Mr. Stone's identification and papers, all I was trying to do was verify her identification, her identity" (M.T., 268-269) (Emphasis added). Of no mean significance here, in resolving the issues raised by the Motion to Suppress, the Court originally stated that his inclination was to deny the Motion, but that he wanted "to be as careful" as he could. These remarks he concluded by saying that the trial would commence *after* he had dictated his decision on the following "Monday morning" (M.T., 355). The record now shows this decision was not made until after the verdicts in this case.

B. The trial

Magdalena Gogue, the Government's chief witness verified for the jury that she was a paid Government informer (Tr., 33). She indicated that there came a time when she discussed with Danny Roman, whom she had met through a friend, the purchase of three grams of Cocaine (Tr., 34-35). She revealed how, on April 21, 1976, they had gone to the Bronx. On this occasion she gave

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6. Surely probable cause to arrest must be based on facts which show more than the possibility that the person arrested "might be the culpable party or a co-conspirator" (M.T., 268).

him Three Thousand Dollars ($3,000.00) to purchase some Cocaine (Tr., 37).

During this segment of Gogue's evidence, objections were made to the admission, through her testimony, of any statements supposedly made by Roman. The Court specifically licensed this testimony "subject to connection" (Tr., 38). Not only this, the Court expressly refused to give any limiting instruction with reference to this evidence (*ibid.*).

Following this ruling, the Government was then able to forge a pattern whereby Gogue was permitted to literally parrot, with impunity, her version of various conversations she supposedly had with Roman. Thus, it was that Roman was quoted, by Gogue, with having virtually said his number one source of Cocaine was Stone. (Now, admittedly, Roman never specifically was quoted as having said this, but one reading the Record as a whole is inexorably led to this conclusion.)

Later Gogue testified to having asked Roman if he could purchase any Cocaine from his number one source—who, by then, had acquired the characterization as "his Cleveland source" (Tr., 40). In emphasizing this and other points, the Record shows some of Gogue's telephone conversations with Roman were taped (Tr., 35). Most, if not all, were played for the jury over defense objections (see, *e.g.*, Tr., 42-43).

These taped conversations included one had May 3, 1976 (Tr., 47-48). This specific conversation was followed by Gogue's testimony that after Roman took her back to the Bronx, she was told he was "going to Ft. Lee, N. J., to get a sample from the Cleveland source" (Tr., 49). This testimony was later embellished by the Government having her credit Roman with saying "his Cleveland source from New Jersey was not at home" (Tr., 50), and that no one had seen his "Cleveland source but maybe he was at the Playboy Club" (Tr., 51).

May 4, 1976, was still another date from which the Government tortured a taped conversation between Gogue and Roman into evidence against Stone (Tr., 53). In addition, there was her literally "devastating" testimony that:

> "A. . . . Danny Roman told me that his *Cleveland source had just come into New York and the source's girl friend named Gloria*[7] *had gone to the airport to pick him up.*
>
> Danny Roman also mentioned to me that the Cleveland source had a horse racing that day at the Derby but it wasn't the big race and that his name was Don something.
>
> Danny Roman also told me that he had asked the Cleveland source if he brought any cocaine with him but the Cleveland source said nothing and just said that he will meet him the next day.
>
> Danny Roman also told me that the Cleveland source knew all the big narcotics dealers in Boston, Chicago, Cleveland, L.S., San Francisco, and New York. He also mentioned that the man was black.
>
> Danny Roman also mentioned that whenever he couldn't find good cocaine in Las Vegas, that he would call up his Cleveland source and within five minutes they were calling back with a connection named Bob Pierce and supplied him from that point on.

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7. The significance of this segment of Gogue's testimony relates to the fact that the Government offered evidence tending to show Stone shared a home in Ft. Lee, New Jersey with Gloria (see Government Exhibit 33) (*Cf.* Tr., 550-551).

Q. Miss Gogue, did Danny Roman say anything to you about where the Cleveland source lived?

A. He also mentioned that he lived—that he had an apartment on the East side and the West side of Manhattan.

Q. Was that two apartments?

A. Yes, sir.

Q. What else did Danny Roman say that evening with respect to the Cleveland source of supply of the cocaine?

A. He also mentioned that he used to pick up and deliver packages for the Cleveland source and got paid in cocaine for his work." (Tr., 58-59) (Emphasis added).

Additional questions in this same vein are rampant throughout this Record. These encompass some asked by the Court, including the one that resulted in the Court repeating "The horse that the Cleveland source owned was named Don" (Tr., 61).

Other taped conversations, including one recorded on May 6, 1976, were similarly played for the jury (Tr., 66-67). Like the others, this one was magnified by Gogue's versions of additional conversations had with Roman. On this specific occasion she stated, among other things, that he had been unable to get a sample "from Ft. Lee, New Jersey" (Tr., 67) and that he wanted to form a partnership with her (*ibid.*).

In another conversation, which took place on May 7, 1976, Roman supposedly stated the person who had supplied the Cocaine she had previously received came from "a Cuban" (Tr., 70) in the Bronx.

After May 7, 1976, Gogue says her next contact with Roman was on July 27th, when he simply asked her to take a ride with him. They ended up at 1725 York Avenue. Her testimony was that Roman told his reason for going into this building, was because he was "doing a deal for someone else" with "the Cleveland source" (Tr., 72). Not only this, the Government then had Gogue assert that the "deal" Roman had "hoped" to make involved the "purchase" of some "good quality" Cocaine (Tr., 74).

Following this, Gogue twice testified she had a conversation with Roman in which she asked Roman "if he was able to purchase two ounces of cocaine from the Cleveland source" (Tr., 75). Her choice of words here must be viewed as both precise and meaningful.

Here, again, the defense objected to the admission, as evidence against Stone, of Gogue's testimony as to conversations had by her with Roman (Tr., 80). The Court, in line with its earlier position, reasoned that it was "open to construction that evidence of a connection between Roman and Cleveland's [sic] sources, or Mr. Stone, such evidence as of a time on and after May 4th, would very well support the conclusion that the connection had existed for some time theretofore" (Tr., 81). Based on these remarks, and others, it seems obvious both the Court and the Government were convinced all that was required to give efficacy to this evidence was proof that Roman and Stone "had known each other before" May 4th (*ibid.*).

Additional evidence by Gogue was that when Roman picked her up on July 30th, he was accompanied by another female. They drove to the vicinity of Stone's York Avenue apartment (Tr., 90). There was no conversation about narcotics (Tr., 91). Roman exited the car and entered the building. Upon his return, Gouge says he eventually

gave her "the package that contained the two ounces of cocaine" (Tr., 95). In the wake of this delivery, Gogue claims Roman told her that instead of buying two ounces her people "should start buying a half pound" (Tr., 93).

On August 2, a comparable pattern of events was developed. First there was a recorded telephone conversation between Gogue and Roman (Tr., 96). However, by then the pattern of permitting hearsay had become exaggerated to the point where Gogue ends up telling the jury she had been told by the agents that "Mr. Robert Stone had left his home" (Tr., 98).

This little tidbit the Government then cleverly parlayed, with other testimony by Gogue (that is—that Roman similarly told her "that the people [which translates into Stone] . . . had left" their building [Tr., 98]), into the creation of still another synthetic evidentiary advantage for the Government. After this, Gogue says she postponed the possibility of any additional transaction with Roman until the next day.

This brings us to the August 3, 1976 transaction between Gogue and Roman. Again, she was induced by the Government to advise the jury that the agents had "informed . . . [her] Mr. Stone had left his apartment earlier that day" (Tr., 101). In any event, a tape was played (*ibid.*), and again they ended up at the 89th and York Avenue apartment under the surveillance of the agents. It was after Roman returned from this building that he was arrested and the contraband involved in this case confiscated (Tr., 105).

Gogue's cross-examination exposed that Roman told her he dealt with three or four people as his suppliers (Tr., 138).

Additional evidence critical to this appeal, in addition to showing the Government's apparent ability to develop at will hearsay evidence (Tr., 168-169), was supplied by Agent Jeffrey Hall. This agent, who appropriated the right to use the 11th floor of the apartment building where Stone lived, repeated for the benefit of the jury his earlier testimony about seeing and hearing Roman as he gained entry into the Stone-Greene apartment (Tr., 169). Only this time Hall was more explicit. "He moved up next to the door" (*ibid.*) in order to hear, as he put it, "a man" respond to Roman's apology about being late. Here, it was said, by Agent Hall, that the man had specifically stated "That's okay, I just got back" (Tr., 170).

The scenario involving the ruses was again developed through Hall's evidence, as was the fact that both Stone and Greene were arrested outside their apartment. And, of course, the hearsay pattern of developing all this was fully exploited (Tr., 179-181).

Also significant here is the fact that the Record does not show the testimonial thrust of the conversations supposedly had between the agents and Greene, *after* her arrest, was limited (if admissible at all) to the case as against Greene. As a consequence, the Government succeeded in showing, as substantive proof against Stone [1] that Greene did not make any statement after having *Mirandaized* (Tr., 182), and [2] that Greene refused to consent to a search of *their* apartment (Tr., 187). But even this is not all. Hall was even permitted, in the hearsay segments of his testimony against Stone, to say [3] that Greene told them that the money in the dresser which contained some of the funds given the informant, "belonged to her and her husband" (Tr., 187).

The Record also shows a stipulation that the substance involved in the April 21st transaction contained 19 percent

Cocaine; May 4th, 23 percent; July 30th, 25 percent; August 3rd, 25 percent; that seized from the home, 11 percent; and that taken from Danny Roman, 48 percent. In spite of this evidence, the Court unexplainedly refused to allow the defense to show, through the expert Hall, that the 11 percent purity factor was consistent with the type of Cocaine possessed for one's own use (Tr., 268).

Other agents, including *Kelley*, testified basically to these same events. Included in Smith's evidence were still other references to Gogue's versions of her conversations with Roman.

II.

At the close of the Government's case, Motions were again made by the defense for the exclusion of the considerable hearsay testimony, by the witness Gogue, as to what Roman had told her in conversations about Stone (Tr., 516). Again, the Court denied these Motions.

Some insight into the rationale for the Court's position is provided by his remark that "I think there is evidence independent of Roman's statement that he was acquainted with Stone and Greene prior to July 30th, and August 3rd." This, the Court said, was so because when Roman "was heard at the door of the apartment 11B he is not dealing with strangers, he is dealing with people evidently with whom he is well acquainted" (Tr., 518). This rather novel, and obviously indefensible thesis when viewed in tandem with the Court's conclusion that the foundation conspiracy was shown here "because the acquaintance of Stone and Greene antedates July 30th, and August 4th" (Tr., 520) will really boggle this Court's mind as it does counsel's.

Following the denial of these Motions, and one for Judgment of Acquittal, the case was submitted to the jury.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

I. THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION TO SUPPRESS CERTAIN ILLEGALLY ACQUIRED EVIDENCE.

A. The Arrest of Phyllis Greene Was Illegal; Hence, to the Extent Any Consent (Whether for the Agent to Enter the Petitioner's Apartment or to Inspect Any Property Therein) Resulted Therefrom, the Evidence Acquired Incident Thereto Must Be Deemed "Fruit of the Poisonous Tree."

While it is not beyond dispute as to whether the warrantless arrest of a narcotics suspect is authorized under 21 U.S.C. §878(3); it is at least certain that "such an arrest should be subjected to closer scrutiny than an arrest authorized by warrants issued after the exercise of sound judgment by an impartial magistrate". *U. S. v. Carriger*, 541 F.2d 545, 553 (6th Cir. 1976). Thus, it becomes all the more important here as to whether the agents had probable cause to arrest Phyllis Greene. For, absent probable cause for her arrest, the argument that her "consent" (if this is what it was) allowed them to rummage through Stone's apartment in the manner that created all of the admissions, statements and evidence acquired in the wake thereof, must be viewed in the light of the rules that require the exclusion of evidence acquired in violation of fundamental criteria. See *Brown v. Illinois*, 422 U.S. 590 (1970); *Wong Sun v. U. S.*, 371 U.S. 471 (1963).

The aspect of *Brown v. Illinois, supra*, here being contended for relates to this Court's expressed view that even though there is full compliance with *Miranda*, such

will not alone purge evidence obtained by virtue of an illegal arrest, or other types of overreaching by Government agents. Also see *Davis v. Mississippi*, 394 U.S. 721 (1969) and *Wong Sun v. U. S.*, 371 U.S. 471 (1963).

Our primary focus then is on the evidence necessarily relied on by the Government to show (in accordance with the mandate of *Brown v. Illinois*) that the arrest of Phyllis Greene was lawful. If the arrest was unlawful, or otherwise illegal, the government's burden is to show that her conduct subsequent to such arrest was not impelled thereby (see *Harrison v. U. S.*, 392 U.S. 219 [1968]) and/or that there was sufficient attenuation to purge her subsequent conduct of the taint of the illegal arrest. Stated another way, given the circumstances of an illegal arrest, the Government was required to show a sufficient break in the causative chain of events to establish that Phyllis Greene's "consent" was uninfluenced by the fact that she was under arrest.

We start, of course, with the very formidable idea that she certainly expressed concern over leaving her children unattended on the premises. Most assuredly, there would have been no need for any such concern had she not been placed under arrest.

Then there is the conspicuous fact that the officers in this case brazenly admit to deliberately manipulating Phyllis Greene so as to put themselves in a position to enter this apartment without a warrant.[8] The propriety of this tactic, on the surface at least, appears to clash with views

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8. In *U. S. v. Carriger*, 541 F.2d 545 (6th Cir. 1976), it was explicitly recognized that several circuits have "condemned the tactic of circumventing the Fourth Amendment requirements by manipulating the time of a suspect's arrest to coincide with his presence in a place which the Government agents wish to search" (*id.*, at 553). Also see *U. S. v. Harris*, 321 F.2d 739 (6th Cir. 1963) and *Amador-Gonzalez v. U. S.*, 391 F.2d 308 (5th Cir. 1968) and *Taglavore v. U. S.*, 291 F.2d 262 (9th Cir. 1961).

previously expressed by the Second Circuit, in *United States v. Edmons*, 432 F.2d 577 (2d Cir. 1970). In *Edmons*, the court had recognized that where an illegal arrest was willfully made "for the precise purpose of securing . . . [evidence] that would not otherwise have been obtained" (*id.*, 584), "the fulfillment of this objective is . . . an exploitation of the 'primary illegality' " (*ibid.*).

In any event, surely this Court will recognize that the arrest of Phyllis Greene was not made in good faith. Rather, it was willfully conceived to take place right outside the apartment door as a subterfuge, or pretext, to gain otherwise impermissible access to the interior of this apartment. See *United States v. Harris*, 321 F.2d 739 (6th Cir. 1963) and *McKnight v. United States*, 183 F.2d 977, 978 (D.C. Cir. 1950).

Again the basic contention here is that Greene's arrest was illegal. The only "facts" that can be relied on as supplying probable cause consist solely of the testimony by the agents that "a woman" (presumably Phyllis Greene) admitted Roman to the apartment on August 3, 1976; that Roman had indicated to this woman he was sorry for being late; and that Roman stated that he could order some contraband from *them*, which he interpreted to include Phyllis Greene.

Of course, it must be doubly apparent that probable cause to believe Phyllis Greene had committed, or was committing, an offense was surely not supplied by these "facts". In making this assessment, the statement attributed to Roman, who can in no way qualify as a reliable *informant*, is not ever against his own "penal interest". See *United States v. Harris*, 403 U.S. 573, 584 (1971). And, just as surely Roman's statements do not translate into an admission that the contraband seized from him in any way involved participation by Phyllis Greene. In-

deed, if anything said by Roman is to be credited as bearing on the existence of probable cause to arrest Greene, that would be his admission that the contraband had come from "Stone" (M.T., 28) as distinguished from Stone and his wife.

Not only this, the fact that Roman was only told that Stone, again as distinguished from Stone and his wife, was going to be arrested that day (M.T., 29) becomes still another relevant circumstance. Here the point being made is the insertion of Phyllis Greene's name, by Roman, was obviously inspired for reasons that were just as likely ulterior and unreal, as they were indicative of any criminal involvement by Greene in Roman's alleged activities.

All this being so, the warrantless seizure of the money can not be validated. To the extent then that the jury considered the presence of this money in Stone's apartment as some proof of guilt, he was denied due process.

B. An Apartment Building Dweller's Reasonable Expectation of Privacy Is Violated Where Federal Agents, on Their Own Authority and Without Permission Invade an Upper Floor of Such Building for the Purpose of Conducting Surreptitious Surveillance of, and to Eavesdrop on Possible Conversations Emanating From, a Specific Apartment. This Is Especially So, Where the Entry to Such Building Is Not Only Supervised by a Doorman, but the Tenants Are Assured, and Any Person Seeking Entry Is Advised, That "All Visitors Must be Announced."

The facts crucial to this issue, as outlined earlier (*supra*. pp. 15-16), show certain agents without a warrant, but in any event without permission, placed themselves on the

11th floor of Stone's apartment building. In the process they also made use of both a vacant apartment, and the stairwell, to secrete themselves.

As a direct consequence of this effort these agents were able to testify to having seen Roman enter and exit Stone's apartment. They were also able to testify to having heard Stone engage in conversations with Roman, during which Stone supposedly indicated that he had just gotten back to the apartment.

To dispel any notion that this evidence was nonetheless harmless, it may suffice simply to note that without the evidence acquired as a consequence of the surveillance made on the 11th floor there is simply no way the conviction of Stone can survive. See *In Re Winship*, 397 U.S. 358 (1970).

So postured, we contend the entry by these agents constituted a trespass, and as such the acts of the agents should be viewed as an intrusion into a constitutionally protected area. Now, in making this contention to the Court of Appeals, we were admittedly faced, at the outset, by three decisions rendered by that Court, which arguably stood for the proposition that where the entry, under circumstances comparable to those here, is peaceable, there is no violation of the tenants' Fourth Amendment rights. See *United States v. Wilkes*, 451 F.2d 938 (2d Cir. 1971); *United States v. Conti*, 361 F.2d 152 (2d Cir. 1966) and *United States v. Miguel*, 340 F.2d 812 (2d Cir. 1965).

By way of contrast, the Sixth Circuit, in *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976), reached the opposite conclusion by specifically rejecting these Second Circuit cases. Not only this, in dealing directly with these cases, the *Carriger* court makes the valid point that, neither *Wilkes*, *Conti*, nor *Miguel* reckoned with the appar-

ent thrust of *Katz v. United States*, 389 U.S. 347 (1967). If this is so, then the Second Circuit's view in *Wilkes*, bottomed as it is on *Conti* and *Miguel*, cannot be said to be a valid response as to whether *Wilkes* survived *Katz*.

In any event, at least this much seems certain, the views expressed in *Carriger*, buttressed by that Court's reliance on *McDonald v. U. S.*, 335 U.S. 451 (1948) and *Fixel v. Wainwright*, 493 F.2d 480 (5th Cir. 1974), ought to surely require this Court to evaluate the position expressed in *Wilkes*.[9] In voicing this judgment, the sagacious remarks, made by the late Mr. Justice Jackson, in *McDonald v. U. S.*, seem especially applicable. Here it was said:

> "It seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry. Here the police gained access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal." 335 U.S., at 458-459.

Significantly, in *Carriger*, the Sixth Circuit not only reasoned that the entry into the building "without permission and without a warrant of any kind was an illegal entry and violated appellant's Fourth Amendment rights" (541 F.2d, at 550), the court also concluded that no distinction could be made on the basis of whether, or not, the entry was peaceable (*id.*, 550-551). So in this case we contend that Stone's reasonable expectations of privacy were traversed when these agents entered his building

9. While the Appellate Court failed to render a formal opinion in its disposition of Stone's appeal, the Court did express its continued reliance on the efficacy of *Wilkes*.

"by guile through a normally . . . [controlled access] entrance door" (*ibid.*) for the obvious purpose of invading his privacy.

This being so, it follows that all evidence come at by exploitation of this primary illegality should be suppressed. See *Wong Sun v. U. S.*, 371 U.S. 471 (1963). As applied here, the exclusion of such evidence would eliminate any influence the overheard conversations, and the stealthy observations made on the 11th floor, may have had on the Judge's determination that a conspiracy existed. It would also require a finding that to the extent this evidence influenced the jury to convict, Stone was denied due process. *Harrington v. California*, 395 U.S. 250 (1969).

II. THE ADMISSION OF CONSIDERABLE EVIDENCE SHOWING THE CONTENT OF VARIOUS CONVERSATIONS, HAD BY A CRUCIAL PROSECUTION WITNESS WITH A THIRD PARTY, VIOLATED PETITIONER'S "RIGHT OF CONFRONTATION" AND THE "HEARSAY RULE".

A. Contrary to the Position Expressed Herein by the Trial Court, More Is Required to Establish a Conspiracy Than a Showing That the Parties Knew Each Other. What Is Required for Statements Made by One Individual to Be Admissible Against a Defendant Is Proof That Such Statements Were Made in Furtherance of a Conspiracy in Which the Defendant Was a Member.

We concede that, under the co-conspiracy exception to the hearsay rule, testimony as to extrajudicial statements may be admitted if it is established, by evidence other than such hearsay, that the accused (here, Stone) was involved in a conspiracy with the declarant (in this

case, Danny Roman) *and* that the statements were made in furtherance of such conspiracy. *U. S. v. Geaney*, 417 F.2d 1116 (2d Cir., 1969). Also see *Federal Rules of Evidence*, Rule 801(d)(2)(E). This rule, which certainly is not of recent vintage (*Lutwak v. U. S.*, 344 U.S. 604 [1953]), does not exist as though oblivious to values implicit in the "accused's rights to be confronted by the witnesses against him."

The fact that these values must be reckoned with in a meaningful way was made most clear by this Court in *California v. Green*, 399 U.S. 149 (1970). Here the Court noted that "more than once [they had] found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception" (*id.*, 155).

To begin with, in our case we are primarily concerned with the statements attributed to Roman by Gogue, statements which were made a part of the evidence used to convict Stone. More specifically, and to context this argument, Gogue's evidence includes conversations (some of which were taped) had on various dates in May, July and August with Roman. The narcotic transactions, which the Government contends specifically involve Stone, took place on July 30th and August 3rd.

The question then is how can the Government justify the admission of evidence concerning the activities and conversations of Gogue and Roman prior to these dates. The trial Court's stated position was that there was "evidence independent of Roman's statement that he was acquainted with Stone and Greene prior to July 30th and August 3rd" (Tr., 516). And, that the conversation heard by the agents, when Roman was admitted to the apartment, showed he was "well acquainted" with Stone and Greene (Tr., 518).

On the other hand, it may suffice simply to note that the only possible proof Stone and Roman were even acquaintances came from Roman. Hence, even if true, this fact would only show their "mere association," which is hardly proof of the required fact. Stated another way, the fact that Roman may have known a lot of things about Stone (including where he lived and even where his girlfriends lived) surely does not establish them to be conspirators, and thus make everything Roman may have done, and said, imputable to Stone. Indeed, the very first indication, even remotely resembling evidence, of this acquaintanceship flows from Roman's statement to Gogue that his "people" had left home (Tr., 98), and the agent's verification of Stone's departure (*ibid.*). Apart from the cogent argument that merely because Roman correctly communicated this information does not prove he and Stone were conspiring; this proof in no event proves they were conspirators. See *U. S. v. Cantrone*, 426 F.2d 902 (2d Cir. 1970).

In *Cantrone*, the Court held that while a jury could very well have found a conspiracy on a specific date, "this finding cannot cure the insufficiency of the evidence to establish the existence of such a conspiracy [even] three days earlier" (*id.*, 904-905). If this concept is still viable, then it would follow that even proof that Roman and Stone were conspirators on July 27th and August 3rd, does not satisfy the prerequisite for the admission of the testimony against which this argument is directed.

To be sure then, there was simply no evidence from which the Court (in the first instance) nor the jury, could conclude that the remarks supposedly made by Roman to Gogue were made "with the knowledge and on behalf of" Stone. See *U. S. v. Lawson*, 523 F.2d 804, 806 (5th Cir. 1973). Nor was there any evidence tending to show that

Stone acted in furtherance of the illegal transactions that took place between Roman and Gogue prior to July 29th. Also see *U. S. v. Cianchetti,* 315 F.2d 504 (2d Cir. 1963), and *U. S. v. Calaway,* 524 F.2d 609, 614 (9th Cir. 1975).

In *Cianchetti,* the facts showed not only that the accused knew of the existence of the charged conspiracy, but had on occasions actually participated in discussions with others who were proven to be conspirators. The Court's unwillingness to find Cianchetti to be a conspirator stands in sharp contrast to the view of the trial Court here, that is—a mere showing that the parties knew each other was sufficient.

B. Where Evidence Originating With a Non-Testifying Declarant Is Offered Against an Accused, the Prosecution Must Demonstrate Such Evidence Has an Independent "Indicia of Reliability".

Again, the thrust of Petitioner's argument is that the jury's consideration of the testimony concerning the converations supposedly had between Gogue and Roman, violated both his right of confrontation and the hearsay rule. In making this argument here, it should be noted that, as was stated in the plurality opinion in *Dutton v. Evans,* 400 U.S. 74 (1970), "the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of the fact [has] a satisfactory basis for evaluating the truth of the prior statement." (*id.,* 89).

The statements attributed to Roman contained the implied assertion that Robert Stone was somehow involved with him in various narcotics transactions. The truth of

this implication depends not only on whether Danny Roman made the statements, but on whether the statements (if made) were reliable. This question turns on the answers as to [1] whether there was "a satisfactory basis for evaluation" their truth (*California v. Green,* 399 U.S. at 161); [2] whether cross-examination could have possibly exposed the statements, if made, to be unreliable (*Dutton v. Evans,* 400 U.S., at 89); and [3] whether the statements themselves contained a sufficient "indicia of reliability" (*ibid.*).

It may suffice here simply to say that Roman in this case, like the defendant in *Dutton,* was only able to cross-examine the witness, who purportedly was quoting the declarant, on the factual questions as to whether the witness actually heard the particular statements which arguably implicated him. Neither was able to cross-examine the alleged declarants.

In the context of this case, the confrontation clause guaranteed Robert Stone, since he could not cross-examine, or otherwise confront, the asserted declarant (*i.e.,* Danny Roman), that he (Stone) should have a satisfactory substitute for testing accuracy of the statements imputed to such declarant. The Government, under *Dutton,* was also required to demonstrate that evidence of this type had such an independent "indicia of reliability" that cross-examination would serve no useful purpose. 400 U.S., at 88-89.

What we have here is specific testimony by Gogue which shows, beyond dispute, that: [1] Stone was in no way involved in the transactions as a result of which Gogue purchased Cocaine, or received samples of Cocaine, from Roman prior to July 29th; [2] Roman actually tried to deceive Gogue into believing the Cocaine he gave her before July 30th came from his so-called "Cleveland

source"; and [3] Roman was really trying to ingratiate himself with Gogue. Given these facts, it seems all too obvious that such "indicia of reliability" is surely lacking here.

On the other hand, it is conceded that to a degree some of the statements attributed to Roman were verifiable by the accuracy of the tapes. But even this does not furnish a satisfactory basis for crediting the underlying truth of the statements themselves. And, of course, even if Roman in fact made all of the statements attributed to him, still there are a number of possible reasons for the insertion of the existence of a "Cleveland source" for his narcotics, which he fleshed into being Robert Stone. These include the idea that Roman wanted, for his own reasons, to make it appear that he had outstanding connections, and that Stone was that connection.

C. The Admission of an Extrajudicial Statement Imputed by a Prosecution Witness to a Non-Testifying Declarant, Which Statement Was "Crucial" to the Prosecution and "Devastating" to the Defense, Constitutes a Violation of the Right of Confrontation.

As to this, it is beyond dispute the same consideration which generates the hearsay rule support and animate the right of confrontation. Yet, it seems to be all too clear that any apparent similarity of values as between the rule and the right, does not result in the exclusion of all hearsay that may be violative of the confrontation clause, any more than it makes admissible all testimony that qualifies as an acceptable exception to the hearsay rule.

In dealing with this specific point, it is of interest to note, this Court has explicitly held that:

> "While it may be readily conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence: indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." *California v. Green,* 399 U.S. 149, 155 (1970).

What the Court appears to be saying merely because certain evidence can be fit into a hearsay exception is not a constitutionally sufficient protection for the right of confrontation.

In our *judgment,* the absence of an automatic rule of equivalence between the hearsay rule and the right of confrontation requires an assessment here as to the extent to which confrontation values may have been violated by the admission against Stone of the statements made, and supposedly made, by Roman.

Obviously Danny Roman, the asserted declarant, could not be subjected to cross-examination. This would have at least exposed his demeanor, and possible lack of creditability, to the scrutiny of the jury. Hence, the "mission" of the confrontation clause (usually insured by cross-examination) could not be vindicated here.

However, it is also true that a failure to serve this confrontation value may not be fatal where the hearsay testimony is neither "crucial" to the prosecution, nor "devastating" to the defense. *Dutton v. Evans,* 400 U.S., at 85,

87 (1970). Of course, it could not be more obvious, the evidence assailed here was both "crucial" and "devastating". Not only this, unlike the statements made in *Dutton*, the statements made here were not spontaneous, but were in the form of an express assertion that in no way carried with it a caution against it being given undue weight (*id.*, 87-89).

For these reasons the admission of these statements must be viewed as a violation of the confrontation clause.

III. A CONSPIRACY AND AN ACCUSED'S MEMBERSHIP THEREIN (EITHER AS A FOUNDATION FOR THE ADMISSION OF DECLARATIONS ASSERTEDLY MADE IN FURTHERANCE THEREOF, OR AS A CRIMINAL OFFENSE) CANNOT BE ESTABLISHED ON THE BASIS OF HEARSAY STATEMENTS.

In this case the original indictment charged Stone, Greene and Roman with involvement in a conspiracy dating from July 1, 1976 to the date of the indictment. This indictment was superceded by one that expanded the dates to include those between April 22, 1976 and July 1, 1976. Of course, it is now clear this was done so as to facilitate the Government's use, as evidence, against Stone, conversations that supposedly took place during a time Roman was supplying Magdalena Gogue with drugs that obviously were obtained in a manner that did not in any way involve Stone.

The fact that the Government at all times knew these drugs had been purchased or otherwise obtained by Roman from his source in the Bronx has to expose as ulterior the Government's efforts to envelop Stone in these transactions. In any event, these transactions translate into a typical drug purchase by one party from a peddler

(who could not care less about what the purchaser's future plans were) of a specific quantity for a specific sum of money that had its origin with a more remote purchaser. Usually, in transactions of this ilk, the cost to the actual, or conduit, purchaser is less than the money given him by the remote purchaser. If not this, then surely the quantity purchased is larger than that ultimately given to the remote purchaser. And, therein lies the profit for the actual, or conduit, purchaser.

This type of conduct hardly amounts to a conspiracy between the peddler and the remote purchaser. And, just as surely, on the basis of the facts here, it can hardly be found that the transfer of purchased drugs to the remote purchaser was a sale by the original peddler to the "remote purchaser".

This is so, for the obvious reason that these circumstances are more easily reconciled on the theory that the actual "conduit purchaser" (*i.e.*, Roman) was not an agent for the peddler (*e.g.*, the "Cuban") but was the acting agent for a "remote purchaser" (in this case Magdalena Gogue). See, *e.g.*, *U. S. v. Sawyer*, 210 F.2d 169 (3rd Cir. 1954) and *U. S. v. Barcella*, 432 F.2d 570 (1st Cir. 1970). Also see *U. S. v. Winfield*, 341 F.2d 70 (2d Cir. 1965).

But even this is not all, even if the relationship between Roman and his Bronx source was conspiratorial, the question then is what is it that makes Stone a member of such conspiracy. Or, to put it another way, what is it that makes the transpiration of an indirect sale to Gogue by a Bronx peddler (said to be a "Cuban") through Roman an act in furtherance of a conspiracy that included Robert Stone as a member?

All this aside, the most crucial aspect of the conspiracy issues in this case (—that is, as a predicate for the admission of statements supposedly made in furtherance thereof, and as proof of a conspiracy offense) deals specifically with the sufficiency of the Government's proof of a conspiracy. Here, we start with the rather basic tenet that the mere purchase of contraband by one party from another is insufficient to prove the existence of a conspiracy as between such parties.

Indeed, as the Second Circuit cogently recognized in a comparable situation:

> "The purchase of the cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the appellant participated. They had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators." *U. S. v. Koch,* 113 F.2d 982, 983 (2d Cir. 1940); also see *U. S. v. Zeuli,* 137 F.2d 845 (2d Cir. 1943).

In *U. S. v. Hernandes-Carreras,* 451 F.2d 1315 (9th Cir. 1971), the Court considered a case involving facts that are sufficiently analogous to establish our point here. The informant in *Hernandes-Carreras* testified he had been told by a defendant that "they" charged a certain amount for a kilogram of cocaine, and that he (the defendant) would get some samples in a particular town. In distilling these facts for analysis, the Court stated the question was whether, "If A asks B to sell contraband, and B says he will get it from C, B can be convicted of conspiracy with C to sell to A" (*id.*, at 1316).

The Ninth Circuit correctly viewed the required reasoning pattern as a *non sequitur.* As the Court put it, "That does not follow" (*ibid.*). The Court then concluded that "C may know that B intends to resell, or he may not. [Further that] even if he does, that alone does not make him a party to a conspiracy to sell to A" (*ibid.*).

Thus, it would be quite ironic if the Ninth Circuit, based on the Second Circuit's opinion in *U. S. v. Reina,* 242 F.2d 302, 306 (2d Cir. 1957), could properly "decline to hand the Government [the power to convict] . . . in cases where the conviction rests on nothing but what the buyer says the seller said". And the Second Circuit's approval of the conviction of Stone in this case could be squared with the same principle. (451 F.2d, at 1316).

On the other hand, the admission of the conversations had before July 30, or even July 27, stands even less footing. For any connection between Roman and Stone was more tenuous then. In fact, the total range of these conversations would not, even if there had been a conspiracy as between Roman and Stone, have been admissible as having been made in furtherance thereof.

Viewed in this sense, it seems most clear that the jury by the use of inadmissible evidence was able to determine that a conspiracy existed (if, in fact, it showed that), and then such proof was used to bootstrap evidence that would otherwise have been inadmissible into proof of guilt. See *U. S. v. Glasser,* 315 U.S. 60, 74-75 (1942).

IV. WHERE FACTS EXIST THAT PORTEND THE PRESENCE OF A POSSIBLE CONFLICT BETWEEN THE INTERESTS OF THE ACCUSED AND THOSE OF HIS COUNSEL, THE COURT MUST CONDUCT AN IN-DEPTH HEARING TO DETERMINE IF ANY SUCH CIRCUMSTANCES EXIST TO A DEGREE THAT MIGHT DILUTE THE QUALITY OF REPRESENTATION GUARANTEED BY THE SIXTH AMENDMENT. FURTHER, THE ACCUSED SHOULD BE FULLY ADVISED, BY THE COURT, OF THE FACTS UNDERLYING ANY POSSIBLE CONFLICT AS A PREREQUISITE TO A KNOWING "WAIVER" OF THE RIGHT TO SELECT OTHER COUNSEL.

Prior to dealing with Stone's Motion to Suppress, the trial Court openly reflected on the fact that Stone's trial counsel had, as put by the Court, "been named in some indictment" (M.T., 2). The Court's indicated purpose, and apparently the extent of his concern, was to "make it a matter of record so Mr. Stone knows about it" (*ibid.*). As to this, Stone's trial counsel James Siff, Esq., took the position (as did apparently the Court) that it was sufficient if the Court simply verified that Siff had in fact "apprised Mr. Stone of the fact, and of its dangers, and its possible implications and that he . . . [*i.e.*, Stone, was] aware of it" (*ibid.*).

Of no mean significance here, it happened that Counsel for the Government upon being inquired of as to his knowledge of the Siff indictment, merely expressed the lack of any real familiarity with it (M.T., 3). This was said as though such a conclusory assertion excused his failure to fully advise the Court of the facts.

Siff, on the other hand, was precise. Not only was he being prosecuted in the Southern District, as was Stone; but it was "by Narcotics Unit in this district, the same one that . . . [was] presumably . . . prosecuting . . . [Stone's] case (M.T., 3).

The Court's response to all this was limited to a routine query of Stone as to whether he wished, and was willing, that Siff continue to represent him. The Court also inquired as to whether counsel for the co-defendant, and the co-defendant, had "any objections to Mr. Siff continuing" (*ibid.*). All of this was followed by a cryptic observation, made by Siff, as to the effect that "I don't know for sure whether or not I object" (M.T., 4).

We start here with the principle, recognizable as being implicit in our concept of ordered liberty, that: "The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney" (*U. S. v. Carrigan & White*, 543 F.2d 1053 [2d Cir. 1976]) (Lumbard *J.*, Concurring).

The contention that Stone's right to the effective assistance of counsel was compromised by Siff's participation as his trial counsel perforce requires, in the first instance, an assessment of the inquiry conducted by the trial Court. Here the required determination must be, was (even, if possible) there was a knowing "waiver" by Stone of the right he doubtless had to select other counsel to defend him.

Surely, the mandated hearing should have evidenced the resolution of a meaningful concern by the Court as to whether Siff's role as advocate for Stone was to be

in any way less vigorous than would have, or should have, been the case had counsel not been under indictment himself. So postured, when analogized to the conflict cases, the point here being urged seems well taken and is supported by the Second Circuit's expressed position in *Carrigan*.

We deal first with the adequacy of the trial Court's inquiry as to Stone's waiver of an apparent impediment to Siff's continued participation as his counsel. When weighed against the Court's cogent recognition, in *Carrigan*, that a "record barren of any inquiry by the Court or any concern by the Government" was insufficient as a basis for the required judgment as to the existence of a possible conflict; the token inquiry conducted by the trial Court coupled with the Prosecutor's expressed lack of familiarity with the Siff prosecution simply fails to pass muster. For unless *Carrigan* is being misread, given a potential conflict (such as was supplied here by Siff's personal predicament—that is, being under indictment for four narcotic charges) the trial Court was required absolutely to carefully inquire "as to the possibility of prejudice".

Again, we have the rather precise statement by Attorney Siff that (1) he was under indictment in the Southern District, and (2) the narcotics unit involved in his case was "the same one that . . . [was] presumably prosecuting this case" (M.T., 3). Also, it has been reported that shortly after Stone's conviction, Siff was allowed to plead guilty to a misdemeanor.

What all this does is emphasize the patent inadequacy of the trial court's inquiry as to Stone's selection of counsel. It also focuses on the lack of meaningful participation by the government in this debacle.

For just as surely as it should have occurred to the Court to require Siff to disclose the current status of the case pending against him (including the revelation of any suggested plea bargaining arrangements) counsel for the Government should have seen it as his duty to put himself in a position to thoroughly advise[10] the trial Court as to the varying aspects of the Siff prosecution.

Thus, it seems all too clear, in the context of this case, that Stone's representation by Siff was so pregnant with potential prejudice that the trial Court should have found a conflict to exist as a matter of law. See, *The NKC Organization Ltd. and W.E. Greene, Jr. v. Bregman*, 542 F.2d 128 (2d Cir. 1976).

Viewed from still another posture, it does not take an in-depth study of counsel's defensive efforts in this case to realize that while not necessarily assailable as *pro forma*, certainly they are patently amenable to being labeled as less than vigorous. For surely, counsel's examination of the Government's informant was uninspired, and his interrogation of the Government agents was anything but thorough. Not only this, Siff's advice to his client (who could not have been impeached by any prior convictions) not to testify, when viewed objectively is really hard to explain. The same is true of the lack of any effort by counsel to restrict the admission of statements made by Greene *after* the arrests to the case as

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10. The Court, based on *Morgan v. United States*, 396 F.2d 110, 116 (2d Cir. 1968), seemingly could have sanctioned a private disclosure of the relevant facts. In any event, the *Morgan* Court rejected the notion that "specific prejudice" must be shown to support a claim of ineffective assistance of counsel, based on a conflict, in preference to a less rigid standard. See *United States v. Olsen*, 453 F.2d 612, 616 (2d Cir. 1971).

against her.[11] See, *U. S. v. Bruton*, 391 U.S. 123, 144 (1968); *Grunewald v. U. S.*, 353 U.S. 391, 401-402 (1957); and *U. S. v. Glover*, 506 F.2d 291, 298 (2d Cir. 1974).

When these facts are related to the idea (gleanable from the views expressed in *U. S. v. DeBerry*, 487 F.2d 448, 452 (2d Cir. 1973), it becomes even more apparent that "however well-intentioned. . . [the inquiry by the District Judge in this case was] not sufficient to establish the absence of prejudice" (*id.*, at 453, fn. 6). So postured, the onus is properly on the Government "to demonstrate from the record that prejudice to the defendant was improbable." *U. S. v. Foster*, 469 F.2d 1, 5 (1st Cir. 1972).

Stated another way, as put by the Court in *Carrigan*, "The lack of satisfactory judicial inquiry shifts the burden of proof on the question of prejudice to the government" (543 F.2d, at 1053). Since there is no way this burden could be sustained without a full evidentiary hearing, this reason alone virtually compels that Stone's conviction be reversed and remanded for this purpose.

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11. The reference here is to testimony by various agents that Phyllis Greene told them such things as the money taken from the dresser, which contained government funds given Roman, "belonged to her and her husband" (Tr., 187), and that the chest of drawers, from which the money was taken, "was her husband's, Mr. Stone" (Tr., 501).

CONCLUSION

For all of the reasons argued herein, or at least some of them, the conviction of Robert Stone should be reviewed by this Court.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
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1300 East Ninth Street
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216/523-1100
Attorney for Petitioner

APPENDIX

APPENDIX A

Journal Entry of the Court of Appeals

(Filed February 17, 1977)

No. 76-1550

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PHILLIS GREEN, ROBERT STONE, a/k/a TRIPP, a/k/a ROBERT CLARENCE JOHNSON, DANNY ROMAN,
Defendants,

ROBERT STONE, a/k/a TRIPP, a/k/a ROBERT CLARENCE JOHNSON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

APPENDIX B

Opinion on Motion to Suppress of the District Court (Inzer B. Wyatt, District Judge)

(Rendered October 22, 1976)

76 Cr. 790

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs.

ROBERT STONE,
Defendant.

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[2] THE COURT: I was going to take this opportunity to dictate to the reporter the reasons why I denied the motion by the two defendants to suppress. That motion was in writing by the two defendants to suppress all evidence seized in Apartment 11-B at 1725 York Avenue on August 3, 1976, and I think the written notice of motion was handed to me in open court at some time, possibly at the time the motion was heard, and it has never been filed and docketed. I'm going to give it to the Clerk now and ask the Clerk to file and docket the notice of motion.

Then there was a hearing on September 15 and 16. Evidence was taken, arguments were heard, and the decision was reserved.

At the opening of trial on September 20 the motion was denied and I said that I wouldn't give reasons **[3]** at that time but would later dictate the reasons for the record, and this is now a statement of the reasons:

The witnesses were the agents and on only one minor point, the defendant Stone. The testimony of the agents is accepted, and to the extent that the testimony of Stone contradicted that of the agents on the minor point, the testimony of the agents is accepted and the testimony by Stone, if contradictory, is rejected.

Also, as to what took place on the 11th floor at 1725 York Avenue and in Apartment 11-B, there was no contradiction by any testimony for the movants. Thus, the testimony of the agents stands uncontradicted.

The relevant facts appear to be these:

The agents were using an informant said by them to have been reliable in the past. The name of the informant was later given at the trial because she, the informant, testified. Her name was Magdaleine Gogue, but simply as a matter of shorthand and convenience she will be referred to simply as Jane Doe as a shortcut, but, as I say, her name has been given.

On July the 30th Jane was given $3600 in official funds to buy cocaine and a list of the money serial numbers was kept. Jane later gave the agents two ounces of cocaine which she said she had bought from Danny Roman **[4]** and for shorthand and convenience I will call Danny Roman simply Dan.

Apparently the agents did not then have positive evidence where Dan had got the cocaine, but they did know that on July 30th he got it at 1725 York Avenue, because they saw him go in and out that building on that day, and that is shown at page 118 of the minutes.

The agents knew that defendant Stone lived in Apartment 11-B at 1725 York Avenue with Phyllis Green as his common law wife. Green has an arrest record and

has used several aliases in the past. See pages 266 and 267 of the minutes.

In Apartment 11-B also lived a teen-age daughter of Phyllis by an earlier union. Her name was Angela, and also there lived two young children of Phyllis by Stone.

On August 3 Jane called Dan and arranged to buy cocaine. She was then given by the agents $3600 in United States currency as official advance funds, the serial numbers of the currency being kept on list.

Dan picked up Jane in his car and drove to 1725 York Avenue, and I will first complete the history as to Dan and then return to Stone and Phyllis. Dan went to Apartment 11-B at 1725 York and was admitted. After [5] about half an hour Dan left 11-B, rejoined Jane and they drove off. The agents followed and got a signal from Jane that she had been given the cocaine by Dan. The agents then stopped Dan's car and arrested him and Jane. They took money from Dan, some of which had the serial numbers of the official funds given by Jane on July 30.

The agents then talked to Dan, told him they had a good case against him and that they knew he got the cocaine from the Stone apartment. Dan nodded. They asked Dan to cooperate. He said he was afraid of Stone.

Dan asked the agents to wait and he would order a package from Stone and his wife.

The agents said that they would not wait and finally Dan said he would not cooperate. At about this time the agents were given two ounces of cocaine by Jane. Whether or not she expressly told them that she had gotten it from Dan, it was evident that she had done

so, and the agents now determined to arrest Stone and Phyllis, and I find that they had probable cause to do so, namely, the facts as then known to them would warrant a prudent man to believe that Stone and Phyllis had violated the narcotics laws by selling cocaine to Dan.

The agents decided to employ a ruse to get Stone and Phyllis out of Apartment 11-B so they could [6] arrest them outside that apartment. Their reasons were that they did not know whether there were other people in the apartment and, if so, how many, or whether weapons were in the apartment, and that they ought to minimize or eliminate the risk of destruction of evidence in the apartment.

On the afternoon of August 3, therefore, the agents went to 1725 York and on a pretext got Stone to come to the garage in that building. They arrested Stone in the garage. Then, on the pretext, they got Phyllis to leave the apartment. She went down to the garage. An agent then asked her if she would go back to her apartment and show him identification for the car of Stone's which was in the garage. She agreed and with the agent went back to the 11th floor. When they got outside the door to Apartment 11-B they met Agent Hall who then arrested Phyllis.

She told the agents that she had young children in 11-B and asked if she could make arrangements to have them taken out of the apartment before she was taken away from the building. The agents agreed and she and the agents went into 11-B. It is not shown by the evidence whether Phyllis opened the door of 11-B with a key or whether someone rang the doorbell and someone else inside [7] opened the door.

Inside 11-B was Angela, the teen-age girl, and two young children. After a few minutes these left Apartment 11-B probably to go to another apartment in the same building. The agents said they would look through the apartment to see if anybody else was there, and they did so, checking each room, closet, under the beds and the like where a person or persons might be concealed. No one was found and nothing was taken, so whether this was a search and whether it was legal or illegal is irrelevant on this motion because nothing was seen.

In the apartment the agents then told Phyllis that they were going to get a search warrant. She said, "Go ahead and search." They asked if she would consent in writing to a search. She said she would sign nothing, but she also said that they would only find a lot of money which she and her husband were going to use to pay the rent. Hall asked where the money was. She said it was in the bedroom and she would show it to them. They all went into the bedroom and on a shelf in a chest of drawers she reached under some sweaters and pulled out stacks of currency.

Hall asked if he could see the money and she handed it over to him. They then went to the living room [8] and the agents told her they wanted to compare the money with the serial number list of money spent by Jane on the two cocaine purchases. They did so and found that some matched. They then told her the money had to be seized, and they did seize it. There was $5700 in currency as shown at page 43 of the minutes.

There is no basis for suppressing this money as evidence. Entry into the apartment was lawful because with the consent of Phyllis; indeed it was for her convenience that the agents went in, and in this connection I refer

to United States against Miley, 513 F. 2d 1191, at pages 1200 to 1202, which is a Second Circuit case from 1975.

Once the agents saw the stacks of currency they were entitled to seize it as evidence. Such a large amount of money in cash, and the agents could see it was a large amount as soon as shown to them, would be admissible as evidence in a narcotics case whether identified as official funds or not, and I refer to United States against Tramunti at 513 F. 2d 1087 plus 1105, a Second Circuit case from 1975.

Therefore, the agents were justified in seizing the money as evidence in plain view.

The evidence at the hearing persuaded me, however, [9] that the agents did not seize the money but that in fact it was given to them by Phyllis or allowed to be taken by them with her consent, and I refer to United States against Candella at 469 F. 2d 173, a Second Circuit case from 1972.

The fact that a suspect is under arrest does not indicate the possibility of a voluntary consent. See United States ex rel. Lundergon against McMann, 417 F. 2d 519.

Nor does the fact that the agents suggest that withholding consent would be futile. See United States against Piet, 498 F. 2d 178, a Seventh Circuit case from 1974.

The number of agents present at the time consent is given does not necessarily mean that the consent was not voluntary, and the fact that Miranda warnings had been given was in favor of the voluntary character of the consent. I refer to United States against Jones, 475 F. 2d 723, a Fifth Circuit case from 1973 in which certiorari was denied in 414 U. S. 841.

Finally, although there is nothing to suggest that Phyllis was aware of the fact that some of the money was official funds, even knowledge on the part of a suspect that a search will demonstrate his guilt does not **[10]** negate the possibility of voluntary consent, and I refer to the McMann case already cited.

Now, after the seizure of the stacks of currency taken by Phyllis from under the sweaters she said that since she was going to jail she ought to have identification because the agents would be looking for it eventually or asking for it. She said her identification would be in the big purse or bag in the bedroom. She and Hall went to the bedroom, that is to the larger of the two bedrooms, but did not find the purse, and then went to a second bedroom and found the bag there. Phyllis picked it up, but Hall took the purse away from her and said that he would look in it for the identification, and Hall testified that he did this for fear that there might be a weapon in the bag and for his own protection he did not want Phyllis putting her hand in the bag.

Hall opened the bag and as soon as he did so saw at once a stack of currency right on top. Hall took this money and told Phyllis that they were going to check it against the serial number lists of the official funds given for the two cocaine purchases. They did so and some of the bills matched, that is, some of the bills taken from the purse of Phyllis had the serial numbers of bills which had been given to Jane as official advance funds.

[11] The agents then told Phyllis that this money would also have to be seized, and they did seize it. There was $4250 as shown at page 48 of the minutes. For substantially the same reasons as in the instance of the under-sweater money there is no basis for suppressing the bag money or purse money.

It must be remembered that it was for her own convenience that Phyllis got to go back to her bag in order to take therefrom the identification papers which she wanted. It was reasonable for the agent to reach into the bag for those papers. He seems to have done so with the consent of Phyllis. But was reasonable, in any event, in order to prevent her from reaching in because a weapon could have been in the bag. To Hall's surprise instead of the identification papers he pulled out a large amount of cash. As was the cash earlier seized, this was evidence in plain view and seizable as such, but in fact it was taken with the consent of Phyllis.

Now, to go back in time for a moment, while the agents were in the apartment with Phyllis and after seizure of the sweater money Hall telephoned an Assistant United States Attorney relating the circumstances and advised that they wanted a search warrant. After the money had been seized, Hall told Agent Kelly to go to **[12]** the United States Attorney's office to prepare an application for a search warrant. Kelly did so and the application was presented in the evening of August 3 to Magistrate Jacobs in his home.

Kelly swore to an affidavit before Magistrate Jacobs at this time. After consideration the Magistrate signed and issued the warrant at 9:15 p.m. on August 3 as shown at page 51 of the minutes, but there is a typographical error and I believe it appears 8:50, but it is obvious it should be 9:50.

Shortly thereafter Kelly telephoned to Apartment 11-B from the home of Magistrate Jacobs. About ten minutes before this telephone call other agents who had been waiting in the corridor on the 11th floor of 1725 York Avenue entered Apartment 11-B. They did this

because they believed that a warrant was being issued about that time and that a telephone call to the apartment would advise them of that fact, and I refer at this point to pages 182, 195 and 196 of the minutes.

The agents got into Apartment 11-B by using a key or keys. The evidence does not establish how they got the keys, whether from Stone or Phyllis when searched at the time of their arrest or from the purse or big bag of Phyllis, or whether the key or keys were lying about in **[13]** the apartment, and pages 182 and 196 of the minutes are relevant in this connection.

When the telephone call came to Apartment 11-B, Kelly advised that the warrant had been issued and that a search could commence. Pages 53 and 54 of the minutes.

The warrant authorized a search for United States currency and for cocaine. There was no search in the apartment before the telephone advice from Kelly about the issuance of the warrant, and I refer to page 196 of the minutes.

Now, the affidavit submitted to Magistrate Jacobs relied only on the events of August 3 and was based almost entirely on the observations of the agents themselves. There was a showing amply sufficient to establish probable cause for the issuance of the warrant under the principles in Jones, 362 U. S. 257, and Harris, 403 U. S. 579.

After the telephone call the agents searched 11-B. Kelly took the warrant with him to Apartment 11-B and arrived there about half an hour after the telephone call. Kelly then took part in the search. A number of items were seized. These are listed in the inventory included in the return which was sworn to before Magistrate Bernikow and filed with him on August the 4th.

[14] Many items were seized which are not in the category of United States currency or cocaine. Those items which turned out to be purely personal, such as jewelry, were ordered returned to Stone and Phyllis, and as to these items the motion to suppress was made moot.

As to the other items which are evidentiary in character, their seizure was proper.

Although the general rule is that agents executing a search warrant may only seize those items that are listed in the warrant as shown by U.S.A. v. Dzialak in 441 F. 2d 212, a long recognized exception to this rule is that when an agent has a warrant to search a given area for specified objects and in the course of that search comes across some other article of incriminating character, the property is seizable under the plain-view doctrine.

An article of incriminating character means a piece of evidence incriminating the accused, and I refer to Coolidge v. New Hampshire, 403 U.S. 443 at page 465, and United States against Pacelli, 470 F. 2d 67, the Second Circuit case from 1972, in which certiorari was denied at 410 U.S. 983.

The items seized in the case at bar, such as scales, white powder, which could have been either cocaine **[15]** or cutting material, and various playing cards and business cards which appeared to have traces of cocaine on them, would appear pretty clearly to fall within the exception noted.

That the search began after the warrant was issued but before the warrant was physically on the premises being searched is of no moment. It would be at most an administrative irregularity, and I refer to United States against Woodring, 444 F. 2d 749, and I would suggest you

see also Katz against the United States, 389 U.S. 347 and Footnote 16 on page 355.

Those, in outline form, are the facts and conclusions on which I relied in denying the motion to suppress.

All right, thank you for coming in.

No. 76-1287

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
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BENJAMIN R. CIVILETTI,
Assistant Attorney General,

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Washington, D.C. 20530.

In the Supreme Court of the United States

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No. 76-1287

ROBERT STONE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1977. The petition for a writ of certiorari was filed on March 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain evidence was lawfully seized.

2. Whether there was independent evidence of petitioner's participation in the conspiracy sufficient to provide an adequate predicate for the admission of hearsay statements of a co-conspirator.

3. Whether the trial court was required to conduct an "in-depth hearing" before allowing petitioner to be represented by an attorney who, as petitioner knew, was under indictment for a narcotics offense.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 (Count I), and of two substantive offenses of distributing cocaine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A) (Counts II and III).[1] He was sentenced to three concurrent terms of ten years' imprisonment and three concurrent special parole terms of three years. The court of appeals affirmed without opinion (Pet. App. A).

On April 21, 1976, Magdalena Gogue, a paid informant for the Drug Enforcement Administration, purchased two ounces of cocaine from petitioner's co-defendant, Danny Roman (Tr. 36-37).[2] At that time, Roman told Gogue that his "number one" source of supply was in Cleveland and that the cocaine from that source would cost $300 more per ounce because it was of better quality (Tr. 39). On April 29, 1976, Gogue asked Roman to get her two ounces of cocaine from his Cleveland source (Tr. 40). On July 27, 1976, Roman drove Gogue to 1725 York Avenue in Manhattan and entered an apartment building. He told Gogue that he

[1]The two substantive counts on which petitioner was convicted involved sales of cocaine on July 30 and August 3, 1976. Petitioner was acquitted on a fourth count of distributing 5.96 grams of cocaine on August 3, 1976. Co-defendant Roman pleaded guilty to a reduced offense. Co-defendant Greene, tried with petitioner, was acquitted.

[2]We are lodging a copy of the transcript of the trial ("Tr.") and of the suppression hearing ("Supp. H.") with the Court.

was carrying out a deal for somebody else with the Cleveland source (Tr. 71-74).[3] Thereafter, Gogue alerted other DEA agents that the Cleveland source lived at 1725 York Avenue (Tr. 75).

On the evening of July 30, 1976, Gogue arranged with Roman to purchase two ounces of cocaine from his Cleveland source. After obtaining $3,600 from the DEA, Gogue drove with Roman to 1725 York Avenue (Tr. 87). Roman took the $3,600 and entered the building. After about thirty minutes, he returned and gave Gogue two ounces of cocaine (Tr. 88-95, 299-300, 367-368).

On August 2, 1976, Gogue called Roman and attempted to negotiate the purchase of an additional two ounces from the Cleveland source (GX 22). At approximately the same time that Roman was to pick her up, Gogue was informed by the DEA agents that petitioner had been seen leaving the York Avenue address. Because the agents wanted to identify petitioner positively as the Cleveland source and arrest him after the transaction occurred, Gogue was instructed to delay the deal (Tr. 98). She did so, and arrangements were made to make the purchase the next day, August 3, 1976 (Tr. 99).

That morning, Gogue arranged with Roman to purchase two ounces of cocaine from the Cleveland source. Because petitioner had been seen by DEA agents leaving the York Avenue apartment and proceeding to Harlem, Gogue was again instructed to delay the transaction (Tr. 372), and she then called Roman and did so. At approximately 3:30 p.m., the agents advised Gogue that petitioner had returned to 1725 York Avenue; Gogue called Roman and asked him

[3]A number of tape-recorded telephone calls between Gogue and Roman relating to arrangements for purchasing cocaine from the Cleveland source were played to the jury.

to pick her up, and they then drove to 1725 York Avenue. Gogue gave Roman $3,600 in government funds, and he entered the building (Tr. 99-103). The DEA Group Supervisor saw Roman get off the elevator at the eleventh floor and enter Apartment 11B. The supervisor heard Roman apologize for his lateness and heard a woman respond. Inside the apartment Roman apologized again, and a man responded, "That's okay, I just got back" (Tr. 167-170, 270). About thirty minutes later, Roman left the apartment carrying a small leather bag, returned to Gogue, who was waiting in the car, and gave her two ounces of cocaine. At this point, Gogue gave a prearranged signal, and she and Roman were placed under arrest (Tr. 104-105). Several of the bills the government had furnished Gogue for the July 30 and August 3, 1976 cocaine purchases were found in Roman's possession (Supp. H. 24-25).

The arresting agents told Roman they knew that the drugs had been obtained from petitioner's apartment. Roman nodded his head, and the agents sought to obtain his cooperation. Roman refused, expressing fear of personal violence if any action were taken immediately. The DEA supervisor then requested the doorman to call petitioner and tell him that some officers were examining his car in the basement garage because they thought it might be a stolen vehicle and that they wanted petitioner to come down. When petitioner complied, he was arrested. The agents then arrested Phyllis Greene, petitioner's common law wife, and with her consent, searched the apartment where she and petitioner lived (Pet. App. 51) and seized marked currency.

ARGUMENT

1. Petitioner argues (Pet. 25-31) that the warrantless search of the York Avenue apartment violated the Fourth Amendment (a) because the presence of the agent in the

hallway outside the apartment when incriminating information was overheard was illegal and tainted the search and seizure, and (b) because the arrest of Phyllis Greene was not based on probable cause and, but for that arrest, she would not have consented to the search of the apartment. Neither contention has merit.

a. Before entering the apartment building the agents told the doorman that they were law enforcement officers. The doorman then permitted the agents to enter the building (Supp. H. 186-187). In these circumstances, the agent did not violate any rights of petitioner by positioning himself in the hallway outside the apartment occupied by Greene and petitioner. See, *e.g.*, *United States* v. *Wilkes*, 451 F. 2d 938, 941 n. 6 (C.A. 2); *United States* v. *Conti*, 361 F. 2d 153, 156-157 (C.A. 2), vacated on other grounds, 390 U.S. 204.[4]

b. Petitioner contends (Pet. 25-28) that the arrest of co-defendant Greene was illegal because it was made without probable cause and that the evidence discovered as a result of a search of the apartment undertaken with her consent should therefore have been suppressed as the fruit of the poisonous tree. After reviewing the evidence, the district court found (Pet. App. 53) that there was probable cause to

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[4]Petitioner's assertion that the Sixth Circuit's decision in *United States* v. *Carriger*, 541 F. 2d 545, is in conflict with this case is incorrect. The holding in *Carriger* applies to the situation in which "an officer enters a locked building, without authority or invitation * * *" (*id.* at 552). Here, the agent entered a high-rise apartment building after they identified themselves to the doorman as law enforcement personnel and obtained his permission to enter. See *Frazier* v. *Cupp*, 394 U.S. 731, 740; *United States* v. *Matlock*, 415 U.S. 164.

McDonald v. *United States*, 335 U.S. 451, and *Fixel* v. *Wainwright*, 492 F. 2d 480 (C.A. 5), upon which petitioner also relies, are inapposite. *McDonald* involved forcible entry into a rooming house, and *Fixel* involved trespass into a yard that was not a common passageway; in neither case had consent to the entry been procured.

arrest Greene, who had admitted Roman to the apartment and been present during the drug sale. *Ibid.* This essentially factual conclusion does not warrant review by this Court.

Moreover, whether or not the arrest of Greene was lawful, it did not violate petitioner's rights, and his claim therefore founders for lack of standing. True, the warrantless search of the apartment shared by petitioner and Greene may be attacked by petitioner on the ground that Greene's consent thereto was involuntary; however, petitioner has not really made that objection, but only an objection, like that of the petitioner in *Brown* v. *Illinois*, 422 U.S. 590, that the voluntary consent was tainted by a prior illegal arrest.

In any event, it is settled that an arrested individual can give a valid consent. *United States* v. *Watson*, 423 U.S. 411. The question remains a factual one of voluntariness, and the fact of arrest—legal or illegal—is merely one factor to be evaluated in determining voluntariness. In this case, the fact of arrest was considered by the district court in its review of the totality of the circumstances surrounding Greene's consent to the search of the apartment and the ensuing plain-view discovery of the currency (Pet. App. 53-57), and its conclusion that the consent was voluntary and valid on the facts of this case would not warrant review by this Court even if the issue were properly raised by the petition and petitioner had standing to challenge the legality of Greene's arrest.

2. Petitioner contends (Pet. 31-41) that even if he was shown to have been a member of a conspiracy with Roman in July and August 1976, there was no reliable independent non-hearsay evidence that he was a member of the same conspiracy in April and May of that year, and therefore the admission of statements Roman made to Gogue in April and May regarding Roman's "Cleveland source" violated petitioner's right of confrontation. This claim was rejected

by the trial court (Tr. 516-520), and it does not warrant review here.

At the outset, we note that petitioner was sentenced to equal concurrent terms of imprisonment on the conspiracy conviction and on the two substantive convictions; since this contention appears wholly unrelated to the substantive counts it is therefore not necessary to consider the claim. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16. Nor is the claim of error even material to the conspiracy conviction, since there was ample nonhearsay evidence to establish that Stone and Roman were engaged in a conspiracy to distribute cocaine. On July 30 and August 3, Roman purchased cocaine with marked currency later found in petitioner's apartment (Supp. H. 24-25), and Roman obviously had had prior contact with petitioner, as the trial court found (Tr. 518). Given the substantial evidence that petitioner was the person referred to by Roman as the "Cleveland source" during the entire period[5] and that Roman and petitioner were engaged in a cocaine distribution conspiracy in July and August (pp. 3-4, *supra*), Roman's earlier statements were plainly reliable and properly admitted as co-conspirator declarations. Moreover, any error in their admission was harmless in view of the overwhelming independent evidence of the conspiracy.

3. Finally, petitioner argues (Pet. 42-46) that his conviction must be reviewed because the district court allegedly failed to make a satisfactory pre-trial inquiry concerning a possible conflict of interest arising from defense counsel's indictment for narcotics offenses. *United States* v. *Carrigan*, 543 F. 2d 1053 (C.A. 2), and similar cases cited by petitioner (Pet. 43-46) have no bearing on this issue. Each

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[5] *E.g.*, Government's Br. on Appeal, pp. 3-12

deals with the trial court's obligation to scrutinize the situation in which a defense attorney represents several defendants with potentially conflicting interests. Here, petitioner's attorney represented petitioner alone.

The trial judge asked defense counsel, in petitioner's presence, to explain to petitioner that he was under indictment. Defense counsel stated that he had previously advised his client of that fact and had explained to him its possible implications (Supp. H. 2-4). The trial judge then asked petitioner whether he was aware of the indictment of his counsel and whether he wished his counsel to continue to represent him. Petitioner responded in the affirmative to both questions (Supp. H. 3).[6] No more was required.

The conflict of interest suggested by petitioner is that his trial counsel, in a effort to curry favor with the prosecutors, might have been motivated to forego a vigorous defense of petitioner. While petitioner has combed the record in retrospect and now suggests several tactical errors that may have been made by his trial counsel (Pet. 45-46), it is sheer speculation to suggest that these minor errors—if errors they were—represented a deliberate attempt to subvert petitioner's case for the personal benefit of counsel. While we do not suggest that a defendant in a criminal case may be forced to accept representation by a lawyer who is under indictment, petitioner knew the pertinent facts and expressed in open court his desire to continue being represented by his counsel. In the absence of any plausible showing that counsel did not faithfully discharge

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[6]Petitioner's reference to his attorney's remark, "I don't know for sure whether or not I object" (Supp. H. 4) is misleading. This statement, read in context in the transcript, is not an objection but was intended by petitioner's counsel as a humorous observation regarding his own indictment.

his responsibilities, and given the improbability that counsel would fail to render effective service for the reason suggested by petitioner, the district court's inquiry was sufficient. Petitioner—understandably disappointed with the outcome of the trial—should not now be permitted to change his mind about his trial representation.[7]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1977.

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[7]At the time of petitioner's trial, there were no negotiations underway between his attorney and the prosecutors regarding the charges against the attorney. Those negotiations were not commenced until a month after petitioner's conviction. They resulted in an agreement under which petitioner's counsel was permitted to plead guilty to a misdemeanor on condition that he resign from the bar (Government's Br. on Appeal, pp. 26, 30).